



Cite as: 2009 (12) AELE Mo. L. J. 201

ISSN 1935-0007

Employment Law Section - December 2009

Insubordination: The principle of “obey and grieve”

Contents

- Introduction
- Illustrative decisions
- Safety & health exception
- Unlawful conduct exception
- Unfair labor practice charges
- References and notes

❖ **Introduction**

Nearly all states authorize public sector bargaining, although not all occupations are covered in some states. AFSCME has compiled a [list](#) of public sector collective bargaining laws. The rights and responsibilities of members of a public sector bargaining unit are established by (a) the federal and state constitutions, (b) state laws, (c) the collectively bargained agreement, and (d) recognized past practices of the parties.

Public employees may be lawfully disciplined for failing to follow an agency’s written directives or a direct order given by a superior, provided the directive or order (a) is lawful, (b) does not impair health or safety, and (c) does not violate the bargaining agreement or the law.

The reason for strict enforcement is that the typical bargaining agreement contains a formalized grievance procedure, which is the exclusive method to protest the actions or demands of a superior or to challenge a managerial policy or directive.

Generally, an employee who violates an employer directive or a superior's order does so at his or her peril. As stated in the leading treatise:

“It is a well-established principle that employees (1) must obey management's order and carry out their job assignments, even if such assignments are believed to violate the agreement and (2) then turn to the grievance procedure for relief.” [1]

This principle is known as “obey now, grieve later.” Union officials have a “special responsibility to “uphold the agreement and to take affirmative action to persuade employees to use the grievance procedure.” [2]

One arbitrator noted that there are six qualifications on the application of the rule:

- (1) The refusal to obey must be knowing, willful, and deliberate;
- (2) The order must be both explicit and clearly given;
- (3) The order must be reasonable and work related;
- (4) The order must have been given by someone the employee understands to have the authority to give it;
- (5) The employee must be made aware of the consequences of failing to follow the directive; and
- (6) If practical, the employee must be given or have time to correct his purportedly insubordinate behavior.

[Multi-County Correctional Center and FOP Ohio](#), FMCS Case #07/03923, 124 LA (BNA) 1519 (Bordone, 2007).

❖ **Illustrative decisions**

- ***Merit Systems Protection Board, 1982***

The Air Force terminated a civilian employee for refusing to shave his facial hair. However, management had committed an unfair labor practice by unilaterally violating a negotiated policy, which allowed employees who wear respirators to be “trimmed or

clean shaven.” The MSPB addressed whether the employee had a duty to obey an order based on an invalid policy. The Board wrote:

“In [*Walker v. Birmingham*](#), 388 U.S. 307, the Supreme Court held that ‘petitioners... could not bypass orderly judicial review of the injunction to prohibit parades, etc., before disobeying it in spite of the injunction being overbroad and arguably unconstitutional.’

“The case stands for the proposition that individuals do not have the unfettered right to disregard a law, rule or regulation merely because substantial reason exists regarding the constitutionality or validity of that law, rule or regulation.

“Applying the foregoing to the present case, appellant was obliged to obey the agency’s order while taking whatever necessary steps he thought appropriate to challenge the ultimate validity of the order and policy. To find otherwise would have the effect of undermining the statutory scheme established to preserve employee rights without unreasonably preventing agencies from carrying out their missions.”

The Board then noted there could be “limited circumstances” allowing employees to disobey an order that might place them in danger. However, the appellant expressed only cosmetic concerns. [*Gragg v. U.S. Air Force*](#), #DA 07528010134, 11 MSPB 546, 13 M.S.P.R. 296, 1982 MSPB Lexis 435 (1982).

- ***Merit Systems Protection Board, 1997***

In a more recent case, the Board wrote:

“Employees do not have an unfettered right to disregard supervisory instructions. Rather, an employee must obey the agency order, even if he believes it to be improper, and protest the propriety of the order later.”

The case involved a postal worker who smelled of alcohol and refused to submit to an alcohol test. [*Howarth v. U.S. Postal Service*](#), #PH-0752-96-0202-I-1, 77 M.S.P.R. 1 at 5, 1997 MSPB Lexis 1422 at *15 (1997).

The next case illustrates the precarious decision to disobey managerial authority and to litigate the outcome.

- ***Illinois Supreme Court, 1998***

A southern Illinois sheriff asked a sergeant to disclose how many times her husband was at the sheriff's dept., how long he had stayed, how many times she was outside the while she was on duty. The sergeant was accompanied by her "[*Weingarten*](#)" union representative. The sheriff ordered the representative to leave the room. The sergeant stated she would not talk to the sheriff without representation. She was fired for insubordination.

A three-judge Appellate Court overturned her dismissal. While the meeting "was more in the nature of an informal inquiry than a formal investigation," they concluded that she was entitled to a *Weingarten* representative. [*Ehlers v. Jackson Co. Sheriff's Merit Cmsn.*](#), #5-96-0488, 289 Ill. App.3d 1118, 683 N.E.2d 141 (5th Dist. 1997).

The Illinois Supreme Court reversed that holding, 6-to-1, finding that the sergeant was not subjected to an "interrogation" within the meaning of the state's peace officer rights laws. [*Ehlers v. Jackson Co. Sheriff's Merit Cmsn.*](#), #83949, 183 Ill.2d 83, 697 N.E.2d 717 (1998).

This case vividly illustrates the dilemma facing a member of a bargaining unit. She could have obeyed the sheriff and then filed a grievance. Although a bargaining agreement can adopt various forms of dispute resolution, the typical method is to refer a denied grievance to a neutral arbitrator, who will render a non-appealable decision:

["In arbitrating, parties are compelled by their own agreement to accept the decision of an arbitrator as final and binding. The objective of arbitration is adjudication, not compromise."](#) [3]

Instead, she chose to defy the sheriff and to litigate her rights. Although an Appellate Court unanimously overturned her termination, the state's Supreme Court reversed that finding.

- ❖ ***Safety and health exception***

A suburban Chicago firefighter was suspended because he had refused to climb onto the roof of a burned out dwelling, as part of a training exercise. The insubordination charge

was dropped after the roof collapsed a few days later. That incident highlighted an important exception to the “obey and grieve” rule.

The safety and health exception has limitations. It may not apply because of the nature of the employee’s occupation. Firefighters, correctional officers and law enforcement officers are confronted routinely with risks not faced by other workers. In general:

1. The risk must be unusual or abnormal for public safety personnel. [4]
2. The employee must reasonably believe that a hazard exists at the time of the refusal.
3. The employee has a duty to demonstrate that the insubordinate behavior was triggered by safety considerations, and not some other reason.

The trier of fact will ultimately decide where an employee’s fear of danger was reasonable. For example, an arbitrator upheld the disciplinary suspension of a park police officer who refused demonstration duty without wearing his helmet. He was unable to show that the duty posed a serious danger. *National Park Service and Policemen’s Assn. of the Dist. of Col.*, #78K23998, 51 Fire & Pol. Persnl. Rptr. 6 (Pritzker, 1979).

The Labor Management Relations Act of 1947, [29 U.S. Code §143](#), protects the right of employees, in good faith, to avoid “abnormally dangerous conditions.” Although the LMRA does not apply to public employees, the Act formally recognizes, as a policy, the safety exception.

The Supreme Court, however, has emphasized that under that provision, an employee must present “ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.” [Gateway Coal Co. v. United Mine Workers](#), #72-782, 414 U.S. 368 (1974).

Section 11(c) (1) of the [Occupational Safety and Health Act of 1970](#) protects covered employees from disciplinary action for adhering to applicable OSHA regulations. [5] In reviewing OSHA standards, the Supreme Court has noted that while safety violations occur infrequently:

“... such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

“Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety.” [*Whirlpool Corp. v. Marshall*](#), #78-1870, 445 U.S. 1 (1980).

In New York, management contended that two environmental police officers violated a clear order and improperly answered a 911 domestic violence call, without obtaining prior approval, as required by their agency. The officers maintained that their actions fell within the health and safety exception to the principle of “obey now, grieve later.”

The N.Y.C. Office of Administrative Trials and Hearings found that the officers reasonably believed that there was an imminent threat to the health and safety of others. Their failure to seek prior approval before responding was not insubordination. [*Dept. of Environmental Protection v. Nuccio*](#), OATH Index #2360/08 & 2361/08 (2008).

There are instances where arbitrators have extended the exception to encompass concerns for the safety of coworkers or third parties. [6]

❖ *Unlawful conduct exception*

The few cases where public employees are formally disciplined for a refusal to commit a criminal act are unlikely to ever reach an appellate court. No person, especially a peace officer, should be punished for declining to break the law.

Rarely, however, would a superior demand that a subordinate arrest a person without just cause or forcibly enter a home without a warrant or exigent circumstances. What is more likely to occur, is for a superior to request a criminal history check on someone for private reasons, or to purge a file of an incriminating document as a political favor to someone.

In Connecticut, a sergeant insisted that an officer sign the Return of an Arrest Warrant, even though he did not affect the arrest. The officer was given a two-day suspension when he refused to comply. He grieved and the union took the case to arbitration.

The arbitrator concluded that the “obey and grieve” rule applied, and upheld the suspension. The union challenged the arbitral award in Superior Court. The judge overturned the arbitration award as contrary to public policy.

The police department’s own rules specifically forbid officers from “knowingly falsifying police records.” More importantly, Connecticut statutes provide that making a false statement on a judicial document is a Class A misdemeanor.

He wrote that “... a far more important public policy is involved. The honesty of police officers is central to our criminal justice system. In signing search and arrest warrants, judges depend completely on the truthfulness of the police officers’ affidavits supporting them.” [*IBPO L-328 v. Town of Windsor*](#), 293957, 40 Conn. Supp. 145, 483 A.2d 626 (1984).

The refusal does not have to implicate a crime. A commercial airline pilot was fired for refusing to fly an aircraft in violation of an applicable FAA regulation limiting the hours worked by flight crews. Management claimed that the flight segment was safe and that the pilot had a duty to “obey and grieve.” An arbitration panel disagreed, 2-to-1, and ordered reinstatement.

Management challenged the award in federal court, asserting that there was no exception to the “obey and grieve” rule, other than safety concerns. The company claimed the arbitration panel “created the illegality exception out of whole cloth and ‘engrafted’ it into the [bargaining] agreement.”

The judge disagreed and upheld the order to reinstate the pilot. The court of appeals affirmed in a summary order. [*Pan Am Airways v. Air Line Pilots Assn.*](#), #01-2357, 206 F.Supp.2d 12, 2002 U.S. Dist. Lexis 11083 (D.D.C.); affirmed, #02-7084, 62 Fed. Appx. 356, 2003 U.S. App. Lexis 8584 (Unpub. D.C. Cir.).

❖ *Unfair labor practice charges*

During the life of an existing contract, unions have only a limited right to contest existing policies. They can demand negotiations if the employer (a) has unilaterally adopted a new policy or procedure that affects a mandatory subject of bargaining, (b) has declined to follow a recognized past practice, or (c) has imposed new or enhanced disciplinary penalties.

Safety is an exception to this rule, and during the term of an existing agreement the union can seek to negotiate a matter that impacts employee safety. See, *King Co. v. Wash. PERC*, #42854-3-1, 972 P.2d 130 (Wash. App. 1999); *City of Ansonia and IBPO L-457*, Case #MPP-14,356, Decis. #2995 (Conn. Lab. Rel. Bd. 1992); *West St. Paul v. Law Enf. Labor Serv.*, 466 N.W.2d 27 (Minn. App. 1991).

Where safety is implicated and management declines to participate in negotiations, the union can challenge a managerial policy by filing an unfair labor practice charge with the state agency or board that oversees the public employee bargaining process. [7]

If the charge is upheld, the agency or board will order the employer to participate in negotiations with the union in good faith. Impasses are typically resolved by the arbitration process.

❖ **References**

Applying the “Obey Now, Grieve Later” Rule: [Part I](#), [Part II](#). Police One (Aug. 6, 13, 2009).

From Docks to Doctor Offices After 9/11: Refusing to Work Under “Abnormally Dangerous Conditions,” 56 (3) Admin. L. Rev. (Univ. of Ill.) 585 (2004). [Abstract](#).

Grievance Guide, BNA Books (12th edit. 2008). [Abstract](#).

Incorporating Human Rights Principles into U.S. Labor Arbitration: A Proposal for Fundamental Change, 8 Empl. Rts. & Employ. Pol’y J. (Chicago-Kent) 1 (2004). [Abstract](#).

The Rights of Law Enforcement Officers, LRIS Press (6th edit.). [Abstract](#).

Notes:

1. Elkouri & Elkouri, [How Arbitration Works](#) 1023, BNA Books (6th edit. 2003).
2. Id. p. 265.
3. Id. p. 7.
4. Id. p. 1023.
5. OSHA regulations apply to state and local government employers in 26 states. See the [State OSHA directory](#).
6. *Midland Structural Steel Corp.*, 30 LA (BNA) 38 (Kelliher, 1958).
7. Not all states have such an agency or board. AFSCME has an online [listing](#) of state Public Employee Relations Boards.

AELE Monthly Law Journal

Wayne W. Schmidt
Employment Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: wws@aele.org
Tel. 1-800-763-2802

© 2009, by the AELE Law Enforcement Legal Center

Contents may be downloaded, stored, printed or copied,
but may not be republished for commercial purposes.

-
- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
 - The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.
-

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)